

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL MELFI,

Defendant-Appellant.

UNPUBLISHED

October 2, 1998

No. 200967

Genesee Circuit Court

LC No. 95-053214 FC

Before: Murphy, P.J., and Gribbs and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548,¹ for the killing of his twin brother, and sentenced to life without parole. He appeals his conviction as of right. We affirm.

Defendant first argues that the trial court failed to adequately instruct the jury concerning the accomplice testimony that was admitted at trial. Specifically, defendant contends that the trial court did not give the jury a cautionary instruction because the court failed to incorporate the word “caution.” Because defendant failed to object to the trial court’s instructions at trial, we review this issue only for the existence of manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). The trial court read the jury CJI2d 5.4 and 5.6, the substance of which this Court has cited approvingly. *People v Jensen*, 162 Mich App 171, 186-189; 412 NW2d 681 (1987); *People v Billington*, 116 Mich App 220, 228-229; 323 NW2d 343 (1982). These instructions, which inform the jury that it should consider the accomplice’s testimony “more cautiously than ... that of an ordinary witness,” were clearly sufficient to protect defendant’s rights, and we conclude that defendant’s argument is without merit.

Second, defendant argues that the prosecutor improperly introduced evidence of the accomplice’s plea agreement and sentencing consequences. Our review of the record indicates, however, that while the prosecutor introduced the fact that the accomplice witness had entered a plea agreement, defendant failed to object to this testimony. In fact, defendant later elicited the accomplice’s testimony that by pleading to second degree murder, he had avoided spending his life in prison with no

possibility of parole. Although defendant now argues that evidence of the plea agreement was prejudicial, his counsel, apparently believing at trial that evidence of the plea agreement would be favorable to defendant's case, chose to discuss it during his cross-examination of the accomplice in an effort to impeach his testimony. See *People v Dowdy*, 211 Mich App 562, 570-572; 536 NW2d 794 (1995). We will not allow defendant to use the plea information to undermine the accomplice's credibility at trial, and then allow him to argue on appeal that introduction of the evidence of the plea was prejudicial. *Id.* at 572. To the extent that defendant suggests that the trial court should have instructed the jury as to the different sentencing consequences of first- and second-degree murder to help the jury evaluate the credibility of the accomplice's testimony, we conclude that defendant has waived our review of this issue by both failing to request these instructions and by failing to cite any authority on appeal in support of this proposition. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, it appears that defense counsel's cross-examination of the accomplice sufficiently established for the jury the different sentencing consequences between first- and second-degree murder.

Next, defendant argues that the prosecutor committed misconduct and denied him a fair trial when he argued that it was unlikely that the accomplice would be sentenced as a juvenile. Because defendant failed to object to the prosecutor's remark, we will not review his claim unless no curative instruction would have counteracted the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant apparently contends that the prosecutor in his closing argument was attempting to imply that defendant may be sentenced as a juvenile, in which case he would be released at age twenty-one. As we have discussed, defense counsel, in a strategic attempt to discredit the accomplice, elicited testimony that the accomplice could be sentenced as a juvenile and released on his twenty-first birthday. The prosecutor simply responded by clarifying that he had not guaranteed the accomplice sentencing as a juvenile in exchange for his testimony, and by suggesting that it was unlikely that the accomplice would be sentenced as a juvenile. We conclude that the prosecutor's comments were properly responsive to defense counsel's prior questioning of the accomplice. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992) (prosecutorial comments are evaluated in light of defense arguments); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989) (otherwise improper comments may not warrant reversal when they address issues raised by defense counsel). Furthermore, in light of the prosecutor's direction to the jury that they should decide the case based on the evidence at trial, and the trial court's instructions that the arguments of counsel do not constitute evidence and that the jury should not in reaching a verdict consider the possible penalties involved, we conclude that the prosecutor's remark did not prejudice defendant.

Defendant also contends that the prosecutor impermissibly appealed to the jury to sympathize with the victim or to avenge his death. Defendant again failed to object in the trial court to the prosecutor's comments. Viewing the prosecutor's statements in context, he did not ask the jury to sympathize with the victim or to avenge his death. The prosecutor simply suggested that, if the evidence established defendant's guilt beyond a reasonable doubt, the jury should not give him a break merely

because his accomplice received a deal for pleading guilty. Regarding the prosecutor's last statement during closing argument urging the jury not to give defendant more than defendant gave his brother, we conclude that this one statement, in the

context of the rest of the prosecutor's argument, does not warrant reversal. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988). Again, defendant suffered no prejudice in light of the trial court's and the prosecutor's directions that the jury should decide the case based on the evidence, and the trial court's instruction that the jury must not let sympathy impact the verdict.

Finally, defendant contends that the trial court improperly commented that his accomplice, who was convicted based on the same series of events, was clearly guilty. This allegedly improper remark arose within the trial court's reading of CJI2d 5.4, the standard jury instruction regarding undisputed accomplice testimony. Defendant failed to object to the allegedly improper instruction, and therefore we will only review this issue for the existence of manifest injustice. *Kuchar, supra*. After stating that the accomplice was clearly guilty of the same crime with which defendant was charged, the trial court at the prosecutor's request then clarified for the jury that while the accomplice had been charged like defendant with open murder, the accomplice had pleaded guilty to a lesser charge. Based on this clarification by the trial court, the court's statement that its comments and instructions were not to be considered by the jury as evidence, and the existence of prior statements on the record that defendant and his accomplice were both charged with open murder, we conclude that the trial court's allegedly improper remark did not prejudice defendant.

Affirmed.

/s/ William B. Murphy

/s/ Roman S. Gibbs

/s/ Hilda R. Gage

¹ Defendant was sixteen years old at the time he committed the offense. Following waiver hearings, the juvenile court waived jurisdiction and defendant was tried as an adult.